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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1406

CITY OF LOS ANGELES, a municipal corporation,
Petitioner,

vs.

GREATER WESTCHESTER HOMEOWNERS ASSOCIATION, etc., *et al.*,
Respondents.

Amicus Curiae Brief of the Burbank-Glendale-Pasadena Airport Authority in Support of Petition for Writ of Certiorari of the City of Los Angeles.

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To the Honorable Chief Justice, Warren Burger, and Associate Justices of The Supreme Court of The United States:

The Burbank-Glendale-Pasadena Airport Authority ("Authority"), owner and operator of the Burbank-Glendale-Pasadena Airport ("Burbank Airport"), submits this *amicus curiae* brief in support of the Petition for Writ of Certiorari ("Petition") filed herein by petitioner City of Los Angeles. Appendix A to this brief contains stipulations reflecting the concurrance of all parties to this action in the filing of this brief.

Prefatory Statement.

Burbank Airport is, based on passengers served, the seventh largest airport in the State of California, the fiftieth

largest in the nation, and serves as a base for both interstate and intrastate operations of scheduled commercial carriers as well as non-scheduled, charter and business aircraft and general aviation. Because it is situated within the San Fernando Valley, a largely residential area, this airport has been the subject of a number of lawsuits relating to aircraft noise. Most notably, it was the focus of the seminal decision of this Court in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). Lockheed Air Terminal, Inc., its former owner, is also a defendant in *Abacherle, et al. v. Lockheed Air Terminal, Inc.*, now pending in the Los Angeles Superior Court. In that case, essentially identical to the action at bar, 1,265 individual plaintiffs have asserted nuisance and negligence claims for damages alleged to have resulted from the noise of aircraft using Burbank Airport. The Authority thus has a direct and immediate interest in the decision which gives rise to the Petition of the City of Los Angeles.

For the reasons discussed below, it is the Authority's view that the decision of the California Supreme Court in this action conflicts irreconcilably with this Court's decision in *Burbank, supra*, and with the federal control of aviation and airspace management upon which that decision is premised.

The State of California May Not Exercise Its Police Power to Impose Nuisance Liability for Noise Created By Aircraft in Flight.

The essential issue before this Court is correctly framed by the Petition of the City of Los Angeles: May one arm of the state—the judiciary—impose sanctions in the form of tort liability for the noise which necessarily accompanies aircraft in flight when, under the *Burbank* decision, non-proprietor state and local governments are forbidden from

burdening airport operations with "curfews or other local controls"? *Id.* at 638.

The decision of the California Supreme Court does not address, much less answer, this question.[1] Indeed, its formulation of the holding in *Burbank* reflects a fundamental misunderstanding of that opinion:

> ". . . The *Burbank* opinion strongly suggests that any local noise or use restrictions, by whomever imposed, which substantially upset current air schedules or prevented the use of commercial aircraft which were currently operational would burden to an unacceptable degree both federal aviation policy and interstate commerce." Petition, Appendix A, p. 13.

This Court did not, as the California Supreme Court suggests, propose such a qualified ban on local controls. To the contrary, it held that such controls must be proscribed *because* they would of necessity "upset current air schedules" and otherwise intrude upon the national air transportation scheme created by Congress.

The California Supreme Court's confusion of the rationale of *Burbank* with its result leads inevitably to its erroneous conclusion:

> "We cannot assume that the imposition of liability on a proprietor for personal injury would burden commerce to an appreciably greater degree than that represented by the well accepted, indeed constitutionally compelled, exposure of the proprietor to property damage claims." Petition, Appendix A, p. 17.

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[1]The matter is considered briefly in footnote 2 to the concurring opinion of Chief Justice Bird. Petition, Appendix A, p. 28. The concurring opinion, while perceiving the conflict between this Court's holding in *Burbank* and the holding in this action, misstates the nature of the conflict and misconceives the real effect of parochial jury verdicts on the national air transportation system.

This balancing of the possible consequences of state tort liability against the needs of interstate commerce is a replication of the process already undertaken by this Court in *Burbank*, but with a contrary, and impermissible, result: that state courts may assess nuisance damages against airports for operations which they may neither proscribe nor regulate.

Such a use of the state's police powers was of central concern in *Burbank*. In concluding that the entire scheme of federal regulation of aviation manifested an intent to occupy the field, this Court gave express recognition to the need for unified control over air transportation:

> "If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of takeoffs and landings would severely limit the flexibility of FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded." *Id.* at 640 (footnote omitted).

State court interposition into this field is not, in this context, distinguishable from that of other branches of state or municipal government. Each of these entities is equally ill-equipped to fulfill the role of arbiter among the often conflicting interests of safety, noise concerns and the transportation needs of the public, and each comes within *Burbank's* determination that parochial regulation of aviation cannot be permitted.

The California Supreme Court offers two grounds for its view that the awarding of tort damages falls without the ambit of *Burbank:* that such damages are merely the other side of the coin of airport proprietors' power to control noise and that damages are not in fact a form of regulation. Neither ground withstands scrutiny.

A. A "Proprietor Powers" Theory May Not Be Used to Justify State Regulation of Aircraft Operations.

Footnote 14 to the *Burbank* decision (at p. 636) expressly left unresolved the nature and extent of a proprietor's control over operations at its airport. The decision below attempts to fill this blank page by reference to a number of subsequent decisions dealing with proprietor powers (Petition, Appendix A, pp. 10-13), and then concludes: a) that such powers do exist; b) that they are sufficient to deal with airport noise problems;[2] and c) that airport proprietors, as a result, must be absolutely[3] and perpetually[4] liable for the effects of such noise.

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[2]As respondents acknowledged below, the regulatory power in which they seek to clothe proprietors is at best limited. Thus it is undisputed that a proprietor may not take actions which would have the effect of burdening interstate commerce (*British Airways Board v. Port Authority of New York*, 564 F.2d 1002, 1011 (2d Cir. 1977)); which are unreasonable, arbitrary or discriminatory (*British Airways Board v. Port Authority of New York*, 558 F.2d 75, 84 (2d Cir. 1977)); which discriminate as between classes of airport users (49 USC §1349(a)); which affect the actual flight of aircraft (*British Airways, supra*, 558 F.2d at 84); or which relate to rates, routes or services (49 USC §1305(a)(1)). Each of these areas has specifically and indisputably been preempted by the federal government.

Moreover, as the recently enacted Airline Deregulation Act of 1978 (49 USC §1302 *et seq.*) vividly demonstrates, the constraints upon proprietor action are increasing. Now, for example, not only must a proprietor refrain from discriminating against new entrants seeking to use its facility but it may no longer rely upon the buffer of limited grants of route authority by the Civil Aeronautics Board. Under the Deregulation Act, any airline desiring to serve a particular route may do so with only the barest of administrative proceedings standing in its way. *See, e.g.*, 49 USC §§1371(d)(7) and 1371(p).

[3]It is significant that the Supreme Court did not attempt to relate the extent of a proprietor's liability to the extent of its powers or to the degree it failed to exercise the same. Rather it appears to have concluded that the existence of *some*, concededly non-exclusive, level of proprietor control over noise renders the proprietor totally and exclusively liable for all noise damages resulting from the flight of aircraft using its airport.

[4]This decision likewise does not impose any apparent restrictions on the ability of a plaintiff to undertake unlimited successive actions on a "continuing nuisance" theory.

While the errors in this equation are addressed in some detail in the Petition, the most fundamental error is in the underlying assumption that a state court may compel the exercise of such proprietor powers as do exist, or punish a proprietor for the non-exercise thereof.

The notion that such indirect state action avoids the proscriptions of *Burbank* is erroneous. If the City of Burbank is barred from ordering a curfew upon operations at Burbank Airport, may it impose liability on that same airport for the proprietor's failure itself to enact an identical curfew, or undertake other noise abatement measures, under the rubric of recovery against a tort-feasor? If it may not do so, and if *Burbank* has any meaning or vitality it may not, is the state legislature or a state court in any different position?[5]

By thus confusing proprietor powers with state powers the California Supreme Court has not only offered its own answer to the question which this Court left open in *Burbank* but has in the process attempted to bend the boundaries of federal exclusivity which that decision established.

B. Imposition of Damages Is a Form of State Reguation.

The second premise on which the California Supreme Court rested its opinion is that the imposition of damages may, in the context of preemption, be differentiated from the imposition of "direct" controls. In support of this view it cited *Sears, Roebuck & Co. v. Carpenters,* 436 U.S. 180 (1978), and other decisions which have followed and interpreted *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959). Such reliance is misplaced. The essential principle of *Garmon,* which has been left untouched

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[5]The ordinance at issue in the *Burbank* case contained a monetary penalty as the sanction for non-compliance with the curfew. Nuisance liability for failure to comply with the court's conception of acceptable airport operations is functionally equivalent.

by subsequent decisions, is that state damage awards are a form of state control over the party against whom such damages are awarded. If an area is clearly preempted by the federal government, both direct and indirect controls on the part of the state are forbidden.

In *Sears, Roebuck & Co. v. Carpenters, supra,* this Court held that such controls were permissible in an area where Congress did not intend to occupy the entire field:

> ". . . we are unwilling to presume that Congress intended the arguably protected character of the Union's conduct to deprive the California courts of jurisdiction to entertain Sears' trespass action." *Id.* at 207.

Under such circumstances the courts may determine that Congressional objectives will not be undermined by specific state legislation.

A different result obtains where, as in *Garmon,* total federal preemption is found to exist. The field of aircraft noise is such an area:

> "That act [The Noise Control Act of 1972] reaffirms and reinforces the conclusion that FAA, now in conjunction with EPA, has full control over aircraft noise, preempting state and local control." 411 U.S. at 638.

A recent decision of the United States District Court for the Southern District of California expresses this principle well. In *San Diego Unified Port District v. Gianturco,* 457 F.Supp. 283 (S.D. Cal. 1978), the Court considered a curfew imposed on San Diego's Lindbergh Field by the California Department of Transportation. After reviewing the *Burbank* decision, it stated:

> "What the Department seeks to do here, if other states and localities do likewise, would pose very serious problems to the national network of air transportation. There is the further concern that if the De-

partment can successfully force implementation or extension of a curfew by use of a condition attached to a variance, the door will be opened to policymakers and departments at all levels of state and local government to take a similar approach whenever they wish to control airport activity. *Local and state governments should not be permitted to use variances, licenses, and permits to achieve indirectly what the Supreme Court has interdicted them from doing directly.*'' At 292 (Emphasis added).

Under the teachings of *Garmon,* the same may be said with equal force of damage awards.[6]

Conclusion.

For the reasons stated above, and in the Petition, it is respectfully submitted that this Court should issue the requested Writ of Certiorari.

Respectfully submitted,

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[6]The California Supreme Court also finds support for its decision in *Griggs v. Allegheny County,* 369 U.S. 84 (1962), in which this Court permitted the recovery of damages in an inverse condemnation action against an airport proprietor. That such an award was based upon rights arising under the 14th Amendment, and thus could not be preempted, appears to have escaped the Court's attention but is addressed in the concurring opinion of the Chief Justice.